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In The
Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Petitioner,

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO IN RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that the "Partial Birth Abortion Ban Act of 2003," Pub. L. No. 108-105, 117 Stat. 1201 (to be codified at 18 U.S.C. § 1531) ("Act"), is unconstitutional on its face because it effectively bans all forms of dilation and evacuation ("D&E") abortions, the most commonly used previability second-trimester abortion method, and therefore imposes an undue burden on a woman's right to end a previability pregnancy?

2. Whether the Court of Appeals correctly held that the Act is unconstitutionally vague because it fails to provide fair warning of the medical procedures it bans and permits arbitrary and discriminatory enforcement?

3. Whether the Court of Appeals correctly held that the Act is unconstitutional on its face, even if it is construed as banning only the intact variant of D&E abortion, because it bans such abortions even when they are safer for the woman?

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INTRODUCTION

The Court should grant plenary review of the Ninth Circuit's decision and schedule the case for argument with *Gonzales v. Carhart*, No. 05-380. In suggesting that the Court should merely hold the case for decision in *Carhart*, the government soft-pedals the differences between the two cases. In fact, the Ninth Circuit answered two significant constitutional questions that are predicates to the question presented in *Carhart*. The first is whether the Partial-Birth Abortion Ban Act imposes an undue burden on a patient's right to end a previability pregnancy by effectively banning all variants of dilation and evacuation ("D&E") abortions, as opposed to just "intact D&E" abortions.[1] The second is whether the Act is unconstitutionally vague because it does not make clear to physicians whether it bans all variants of D&E (not to mention inductions) or just intact D&E. If the answer to either of these questions is "yes," that is the end of the matter. Only if the answer to both questions is "no" must the Court reach the question presented in *Carhart* (and the third question presented in this case), namely, whether the absence of a health exception renders the Act unconstitutional.

Furthermore, the Ninth Circuit opinion is the only one to grapple with the proper scope of an injunction against

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[1] The courts below used the terms "intact D&E" and "non-intact D&E" rather than "D&X" and "D&E," respectively. As the Ninth Circuit stated, "[t]he labeling of the procedure is of no consequence to our analysis; however, for simplicity's sake we prefer intact and non-intact D&E. What is relevant, however, is that one could substitute D&X for intact D&E wherever the latter term appears in our opinion and nothing would change in any respect." Pet. App. 3a-4a & n.3. This brief uses the same terminology as the opinion below.

enforcement of the Partial-Birth Abortion Ban Act in light of *Ayotte v. Planned Parenthood of N. New England*, ___ U.S. ___, 126 S.Ct. 961 (2006). Should the Court agree that the Act is constitutionally defective, it will presumably wish to turn to this issue. Because the Eighth Circuit in *Carhart* did not have occasion to apply *Ayotte*, this case presents a much better vehicle for addressing the remedy question.

As all parties agree, these constitutional questions are not merely high-profile; they are also very important. Given their importance, the Court should review an appellate case that actually decided them. And instead of adopting the government's question presented, which does not adequately identify the issues decided by the Ninth Circuit, the Court should adopt the questions presented by the Respondents.[2]

STATEMENT

For the convenience of the Court, this Statement does not repeat the detailed discussion of the legal and factual background set forth in the briefs filed in connection with the Petition for Certiorari in *Carhart*. Rather, this Statement focuses on the aspects of the district court and Ninth Circuit opinions that demonstrate the benefits of plenary review of both *Carhart* and this case.

[2] The questions presented in this brief are identical to those contained in the brief of Respondents Planned Parenthood Federation of America and Planned Parenthood Golden Gate.

1. On November 6, 2003, Respondents Planned Parenthood Federation of America, Inc. and Planned Parenthood Golden Gate ("Planned Parenthood") filed suit in the Northern District of California, challenging the constitutionality of the Partial-Birth Abortion Ban Act of 2003 (the "Act"), Pub. L. No. 108-105, 117 Stat. 1201 (to be codified at 18 U.S.C. § 1531).[3] Respondent City and County of San Francisco ("CCSF" or "San Francisco") intervened as a plaintiff to protect the interests of its health providers who perform D&E and induction abortions and the largely low-income patient population served by those providers. After a three-week bench trial in which the parties presented the testimony of thirteen expert witnesses, the district court issued a ruling that described the evidence in detail, made extensive findings of fact, and permanently enjoined the government from enforcing the Act. Pet. App. 55a-218a.

2. The district court held that the Act suffers from three separate constitutional infirmities. First, after analyzing the expert testimony, it found that the Act has the practical effect of banning the same abortion procedures as the Nebraska statute struck down in *Stenberg v.*

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[3] The Act criminalizes the conduct of any doctor who:

> (A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and
>
> (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus. . . .

18 U.S.C. § 1531(b)(1).

Carhart, 530 U.S. 914 (2000). Pet. App. 80a-85a. Among other things, the court made the factual finding that "[w]hen beginning a D&E . . . procedure, a physician cannot predict if the procedure will proceed in such a manner that it violates the Act, but the physician knows that is a possibility." Pet. App. 84a. Accordingly, "[p]hysicians may perform each element contained in the Act's definition in any D&E procedure . . . " *Id.* at 85a. "And, because D&E procedures comprise nearly 85-95% of all second trimester abortions, the Act creates a risk of criminal liability during virtually all abortions performed after the first trimester." *Id.* at 85a-86a.

Second, the district court held that the Act is unconstitutionally vague because physicians reading the Act "do not understand exactly what the Act prohibits." Pet. App. 92a. The court cited a number of flaws in the statutory language that, when considered in light of the trial testimony, contribute to the Act's vagueness. *Id.* at 92a-93a (finding, among other things, that the term "partial-birth abortion" has "little if any medical significance" among practitioners, that the term " 'overt act' may be interpreted to comprise many acts, performed not only in the process of an intact D&E, but in the course of a D&E by disarticulation or induction as well. . . .", and that use of the term "living fetus" adds to the vagueness of the Act).

Third, the court turned to the health exception issue. It stated that although it had already found the Act unconstitutional on undue burden and vagueness grounds, it would also address the plaintiffs' health exception argument "given the time and resources expended by the parties and this court, and the extensive evidence presented on the issue. . . ." *Id.* at 96a. And the court found that, even if the Act could somehow be construed as only

banning intact D&E's in a manner that was not unduly vague, it would still be unconstitutional for failure to include a health exception. *Id.* at 213a-217a.

3. The Ninth Circuit affirmed. Pet. App. 1a-54a. It agreed that the Act imposes an undue burden because, just like the Nebraska statute struck down in *Stenberg*, it bans both intact and non-intact D&E's. Pet. App. 26a-33a. The court noted that although "the *Stenberg* Court provided legislatures with guidance about how to draft statutes that would adequately distinguish between the two forms of D&E," either by expressly stating that the statute regulates only intact D&E's or by tracking the medical differences between the two procedures, "Congress deliberately chose not to follow the Court's guidance." *Id.* at 24a-25a (citing *Stenberg*, 530 U.S. at 939, and 530 U.S. at 950 (O'Connor, J., concurring)). Instead, "Congress defined the prohibited procedure in a way that a number of doctors have explained includes both intact and non-intact D&E's, and that we likewise conclude bans both forms of the procedure." Pet. App. 25a-26a.

The court also agreed with the district court that the Act is unconstitutionally vague. It made clear that even if a colorable argument could be made that the Act extends only to intact D&E's, physicians who set out to perform non-intact D&E's "have good reason to fear that they will be deemed subject to [the Act's] prohibitions," because the terms of the Act "could readily be applied to a range of methods of performing post-first trimester abortions." *Id.* at 37a.

The court also found, as the Eighth Circuit did in *Carhart*, that the absence of a health exception rendered the Act unconstitutional under *Stenberg*:

> In reviewing the Act's lack of a health exception, the dispositive question is not, as the government asserts, whether Congress's finding that the prohibited procedures are never necessary to preserve the health of a mother offers a reasonable (or plausible) resolution of a genuine factual dispute (which incidentally the record shows it does not). Rather, under *Stenberg*, it is whether there is general agreement in the medical community that there are no circumstances in which the procedure would be necessary to preserve a woman's health.
>
> Even the most cursory review of the Act and the congressional record developed in support of it reveals that no such medical consensus exists, a fact that the government essentially concedes in its brief to this court and that is fully confirmed by the evidence introduced in the district court during trial.

Pet. App. 21a-22a.

Finally, the court addressed the question of how to remedy the Act's constitutional defects in light of this Court's recent decision in *Ayotte v. Planned Parenthood of N. New England*, ___ U.S. ___, 126 S.Ct. 961 (2006). Applying *Ayotte*, the court concluded that it could not issue a narrower injunction. Pet. App. 41a. Specifically, the court concluded that it would be improper to issue an injunction that adds a health exception to the statute when Congress had deliberately excluded it:

> Congress did not inadvertently omit a health exception from the Act. It was not only fully aware of *Stenberg's* holding that a statute regulating "partial-birth abortion" requires a health exception, but it adopted the Act in a deliberate effort

> to persuade the Court to reverse that part of its decision.

Pet. App. 42a. To demonstrate this point, the court quoted extensively from the Congressional Record, citing, among other things, the following statement from the Act's lead Senate sponsor: "We are here because the Supreme Court defended the indefensible [in *Stenberg*]. . . . We have responded to the Supreme Court. I hope the Justices read this Record because I am talking to you. . . . [T]here is no reason for a health exception." Pet. App. 42a & n.26 (brackets in original).

Similarly, the court concluded that it would not be appropriate to devise a narrow judicial remedy for the Act's other constitutional defects:

> Congress did not unintentionally draft the broad definition of "partial-birth abortion" that gives rise to the undue burden and vagueness concerns, nor did it write the unconstitutionally overbroad language without the benefit of judicial guidance. Instead, Congress chose not to follow the roadmap the Court provided in *Stenberg*. . . . Even if we could draft a remedy that sufficiently restricted the scope of the statute (which we believe we could not properly do consistent with our limited judicial role), such a narrowing construction would serve not to cure an error but to reverse a political judgment that Congress expressly made.

Pet. App. 51a-53a.

REASONS FOR GRANTING THE PETITION

The government suggests that the Court should simply hold this case for a decision in *Carhart*, even though the Eighth Circuit addressed only the question whether the absence of a health exception rendered the Act unconstitutional. The basis for this suggestion is the government's view that, in both cases, the health exception is the primary issue. Pet. 7. But as the district court and Ninth Circuit opinions make clear, that is not necessarily so. To the contrary, this Court may ultimately find that the health exception question is the least important of the three, and may never have to reach it.

If the Court finds that the Act imposes an undue burden on a woman's right to end a previability pregnancy by banning the vast majority of previability second trimester abortions, the statute is unconstitutional whether it contains a health exception or not. *Stenberg*, 530 U.S. at 930. Similarly, if the Act fails to put physicians on notice of the conduct for which they may be prosecuted, it is void for vagueness regardless of the existence or lack of a health exception. *See, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Only if the Court finds that the Act *does not* ban both methods of D&E and *is not* unconstitutionally vague about the procedures it bans would the Court be required to address the absence of a health exception. In sum, the first two questions in this case are predicates to the question presented in *Carhart*. They are not, as the government has asserted, subsidiary questions. Pet. 7 (incorporating by reference Supplemental Brief for the Petitioner in *Gonzales v. Carhart*, No. 05-380, at 8-10).

In fact, with respect to vagueness, the parties did not even brief the issue in the Eighth Circuit. The government

suggests this is not a problem because the vagueness argument "substantially overlap[s]" with the argument that the Act imposed an undue burden. *Id.* at 9 & n.2. But although there may be *some* overlap between the undue burden and vagueness issues, the latter presents distinct problems as well. For example, the Ninth Circuit took issue with the Act's use of the phrase "living fetus," noting that a fetus could be considered "living" (although of course not "viable") as early as seven weeks into a pregnancy, thereby creating "additional confusion about the Act's scope." Pet. App. 39a. This aspect of the vagueness inquiry is separate from the question whether the Act bans both forms of D&E as opposed to just one.

In addition to the fact that the Eighth Circuit did not address undue burden or vagueness, if the Court finds the Act unconstitutional in any respect, it may wish to consider the applicability of *Ayotte*. Unlike the Eighth Circuit, the Ninth Circuit confronted this question. Pet. App. 1a-2a, 40a-54a. After thoroughly examining the Congressional Record, the Ninth Circuit found that because Congress had deliberately set out to defy this Court's ruling in *Stenberg*, both with respect to the procedures it banned and the exclusion of a health exception, a narrower injunction would not be appropriate. Pet. App. 42a, 51a-53a. These findings could aid the Court's consideration of the remedy issue. (Indeed, the Ninth Circuit's analysis of the Congressional Record is relevant not only to the remedy issue, but to a question that extends far beyond the abortion debate – whether Congress may, consistent with its constitutional role, respond to Supreme Court decisions in the way that it responded to *Stenberg*.)

Accordingly, the government, by suggesting that the Court hold this case for *Carhart*, is really asking the Court

to decide four extremely important, high-profile constitutional issues (undue burden, vagueness, health exception and remedy) while reviewing an appellate decision that decided *just one* of those issues. San Francisco respectfully suggests that, even if the Court theoretically could decide these questions while reviewing an appellate decision that did not so much as mention them, prudence weighs against such an approach. *Cf. Illinois v. Gates*, 462 U.S. 213, 224 (1983) ("Where difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on our discretion. By doing so, we promote respect for the Court's adjudicatory process and the stability of our decisions") (internal quotations and ellipses omitted).

CONCLUSION

The Court should grant the petition in this case, adopt the questions presented set forth by the Respondents, review the decision below on the merits, and schedule the case for argument with *Carhart*.

Respectfully submitted,

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